Nos. 18-8766 and 18A1044

In the Supreme Court of the United States

CHRISTOPHER LEE PRICE,
Petitioner,
v.
JEFFERSON S. DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

EMERGENCY MOTION TO VACATE STAY OF EXECUTION

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EXECUTION SCHEDULED THURSDAY, FEBRUARY 11, 6:00 P.M. CDT.

EMERGENCY MOTION AND APPLICATION TO VACATE STAY OF EXECTUION

Less than ***six hours*** before his scheduled execution, Christopher Price filed his second emergency motion for stay of execution in this case. Price's delay was unexplained and inexcusable, and his motion should have been denied. Instead, at 4:00 p.m. CDT, the district court entered a sixty-day stay of his execution. "Because [Price] waited until" just hours before his execution "to seek relief," the Court should "grant the State's application to vacate the stay entered" by the district court. *Dunn v. Ray*, 139 S. Ct. 661, 661 (2019) (per curiam).

Worse still, the district court lacked any jurisdiction to enter its stay order. Price filed his *first* emergency motion for preliminary injunction with the district court on March 29, 2019. The district court denied that motion on April 5, 2019, and Price appealed the next day. When Price appealed, "[t]he filing of [the] notice [wa]s an event of jurisdictional significance—it confer[ed] on the court of appeals and divest[ed] the district court of its control over those aspects of the case involved in the appeal." *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1309 (11th Cir. 2003). The Eleventh Circuit affirmed the district court's order on April 10, and Price lodged his petition for a writ of certiorari with this Court. But then, just a few hours ago, he filed a *second* motion for a preliminary injunction with the district court, raising the ***exact same issues*** that the district court had decided on April 5. The Eleventh Circuit has ***not*** issued the mandate; the district court even

recognized as much. *See* Doc. 49 at 3 (nothing that "the Eleventh Circuit … has yet to issue the mandate."). But the district court confused the question of whether it was "fully … implement[ing] the mandate," *Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985), with the more fundamental question of whether it had any authority to act in the first place. It had no such authority. Because the Eleventh Circuit had not returned its mandate, the district court had no authority "to adjudicate anew the merits of the case after either party ha[d] invoked its right of appeal and jurisdiction ha[d] passed to an appellate court." *McClatchy Newspapers v. Cent. Valley Typographical Union No. 46, Int'l Typographical Union*, 686 F.2d 731, 734 (9th Cir. 1982). The Court therefore should vacate the district court's ultra vires order.

The district court also based its decision on the Eleventh Circuit's decision to craft a broad exception to *Glossip* and *Bucklew*. In addition to listing "lethal injection" and "electrocution" as methods of execution, the Alabama Code includes "nitrogen hypoxia." Ala. Code § 15-18-82.1(b)(2). The Eleventh Circuit's *Price* decision held that "[i]f a State adopts a particular method of execution,"—*i.e.*, if the State lists a method in a statute—then ***as a matter of law***, "the method of execution is available to its inmates," and neither *Glossip* nor *Bucklew* apply. *Price v. Comm'r, Dep't of Corr.*, No. 19-11268, 2019 WL 1550234, at *7 (11th Cir. Apr. 10, 2019). The court recognized that Price could not "satisfy *Bucklew*'s requirement," but held that he instead "may satisfy his burden to demonstrate that the method of execution

is feasible and readily implemented by pointing to the executing state's official adoption of that method of execution." *Id.* at *8. Of course, that reasoning is irreconcilable with the Court's repeated recognition that availability turns on practical, not theoretical, availability. And by the Eleventh Circuit's reasoning, *Glossip* should have come out the other way; after all, Oklahoma law clearly allowed the use of sodium thiopental or pentobarbital. *See Glossip*, 135 S. Ct. at 2733 ("In December 2010, Oklahoma became the first State to execute an inmate using pentobarbital.").

Within the last hour, the Eleventh Circuit responded to the district court's ultra vires stay order by simply throwing up its hands and entering its own stay, stating that "[i]n light of the jurisdictional questions raised by the parties' motions, we STAY Price's execution until further order of this Court." *See* Order, *Price*, No. 19-11268 (Apr. 11, 2019). But the Eleventh Circuit's decision merely underscores precisely why courts should not reward litigants for dilatory tactics. The district court's confusion about its jurisdiction was the product of having to issue an order in a matter of hours, which itself was the product of "the last-minute nature of [Price's] application to stay execution." *Dunn*, 139 S. Ct. at 661.

Thus, whether it be Price's incredible delay, the ultra vires nature of the lower court's order, or the Eleventh Circuit's gutting of *Glossip* and *Bucklew*, this Court should vacate the stay. Otherwise, the State's and victims' "important interest in the

timely enforcement of a sentence" will be further "frustrated in this case." *Bucklew*, 139 S. Ct. at 1133.

ARGUMENT

I. Price unduly delayed.

The district court should have refused to grant a stay because Price waited too late to request this relief—less than six hours before his scheduled execution. This case is much worse than what happened in Domineque Ray's case, where this Court recognized that "[a] court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Dunn v. Ray*, 139 S. Ct. 661 (2019) (per curium) (quoting *Gomez v. United States Court for Norther Dist. of Cal*., 503 U.S. 653, 654 (1992) (per curium)). Ray filed a RLUIPA action on January 28, 2019, after the Alabama Supreme Court set his execution for February 7. The district court dismissed the RLUIPA claim on February 1, and Ray filed a motion to stay in the Eleventh Circuit on that same day—six days before his execution. If waiting until ***six days*** before execution was inexcusable delay in *Ray*, then Price's decision to wait until ***six hours*** before his execution to relitigate his *Glossip* claim should have led to a swift denial of his motion.

Nor was there any excuse for Price's delay. The demands of *Baze* and *Glossip* have been known for years. Moreover, (1) Price had an opportunity to elect nitrogen in June 2018, when he was represented by counsel who was pursuing an appeal to

the Eleventh Circuit in his first § 1983 action; (2) Price was on notice in September 2018 that Alabama's Legislature had passed a new method of execution, when the Eleventh Circuit specifically referenced in its opinion that Alabama had adopted nitrogen hypoxia as a means of execution and further noted that Price had not elected this option (*Price* at 5 n.2); (3) Price could have presented his "new" evidence when he filed his second § 1983 petition on February 8, 2019 (approximately one month after the State sought an execution date); and (4) even if Price did not know what would be required by *Bucklew*, which was released on April 1, 2019, he could have presented his "new" evidence as soon as that opinion was released, instead of waiting until less than six hours before his scheduled execution.

II. The district court lacked jurisdiction to consider Price's motion.

Price contended that the district court had jurisdiction to entertain his motion, despite the fact that the mandate has yet to issue from the Eleventh Circuit. He also contended that the district court could provide relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure. He is wrong on both counts. The district court clearly erred in entering an ultra vires order, and the Eleventh Circuit's decision to stay this case rather than vacate that order was likewise in error.

Price is simply wrong when he asserts that the district court could proceed on his application, notwithstanding the appeal pending in this Court and the absence of a mandate from the Eleventh Circuit. Crucially, the Eleventh Circuit's decision was

a published opinion, and the mandate has not issued. *See* 11TH CIR. R. 41-2 ("In any appeal in which a published opinion has issued, the time for issuance of mandate may be shortened only after all circuit judges in regular active service who are not recused or disqualified have been provided with reasonable notice and an opportunity to notify the clerk to withhold issuance of the mandate."). The district court even recognized that the Eleventh Circuit "has yet to issue the mandate." Doc. 49 at 3. "Simply put, jurisdiction follows the mandate." *United States v. Rivera*, 844 F.3d 916, 921 (2d Cir. 1988). As there has been no mandate, the district court had no jurisdiction to entertain Price's motion, and for that reason alone, the stay should be vacated.

Turning then to the very footnote in *De La Fuente v. Kemp*, 2017 WL 2289307, *2 n.3 (N.D. Ga. 2017), upon which Price relied (Doc. 45 at 3), the ability to move forward is as to "portions of the case not related to claims on appeal." *Kemp*, 2017 WL 2289307, at *2 n.3 (citing *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1309 (11th Cir. 2003). As noted in *Green Leaf Nursery*, "[t]he filing of a notice is an event of jurisdictional significance—it confers on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." 341 F.3d at 1309. The district court had no authority to "adjudicate anew the preliminary injunction motion while the same issue is on

appeal before" the Eleventh Circuit. *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 WL 1987042, at *2 (N.D. Cal. June 4, 2012).

Nor is there any question that Price's motion argued "aspects of the case involved in the appeal." *Green Leaf*, 341 F.3d at 1309. Indeed, the first two pages of his motion stated that he was trying to "fill the evidentiary gap that the Eleventh Circuit flagged." (Doc. 45 at 1–2.). He simply took a second bite at the apple. But until the Eleventh Circuit returns its mandate, the district court had no authority "to adjudicate anew the merits of the case after either party ha[d] invoked its right of appeal and jurisdiction ha[d] passed to an appellate court." *McClatchy Newspapers v. Cent. Valley Typographical Union No. 46, Int'l Typographical Union*, 686 F.2d 731, 734 (9th Cir. 1982). Due to this oversight, the court acted without any lawful authority, and its order must be vacated.

Further, more than facts are involved in the ongoing appeal. As the Eleventh Circuit stated in its opinion, the district court's factual findings were only one aspect of the appeal, with the scope of *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015), and *Baze v. Rees*, 553 U.S. 35 (2008), in light of *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), being another important issue that was implicated by Price's last-minute filing. *See Price v. Comm'r, Dep't of Corrs.*, No. 19-11268, 2019 WL 1550234, at *6–10 (11th Cir. Apr. 10, 2019).

Nor could Price rely on Rule 60(b) of the Federal Rules of Civil Procedure. It is the "'mistakes' of judges [that] may be remedied under this provision." *Parks v. U.S. Life and Credit Corp.*, 677 F.2d 838, 839-40 (11th Cir. 1982) (citing *Meadows v. Cohen*, 409 F.2d 750, 752 n.4 (5th Cir. 1969)). Further, the "rule encompasses mistakes in the application of the law." *Id.* (citing *Oliver v. Home Indem. Co.*, 470 F.2d 329 (5th Cir. 1972)). Even when the Eleventh Circuit has permitted Rule 60(b) to be employed as to factual issues, the "mistakes" were made by judges, not counsel for a party. *See Nisson v. Lundy*, 975 F.2d 802, 806 (11th Cir. 1992). It cannot be said that any "mistake" in this case rested with the district court.

Finally, a Rule 60(b) motion cannot be used as a substitute for a proper and timely appeal. *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993). Having started down the road of his appeal of the district court's denial of the preliminary injunction under review, Price could not employ Rule 60(b) in the manner he attempted, and the stay is due to be vacated.

III. Nitrogen hypoxia is not available to the ADOC.

As put forth in the State's brief in opposition, the Eleventh Circuit, and now the district court, erred in holding that nitrogen hypoxia is "available" to Price as a method of execution simply because it is now contemplated by state statute. *Price*, 2019 WL 1550234, at *8. That reasoning is contrary to this Court's case law and will also have perverse effects for both States and the condemned.

The Eleventh Circuit concluded that "[i]f a State adopts a particular method of execution . . . it thereby concedes that the method of execution is available to its inmates." *Id.* at *7. But both sodium thiopental and pentobarbital were statutorily authorized for Oklahoma. *See Glossip*, 135 S. Ct. at 2733 ("In December 2010, Oklahoma became the first State to execute an inmate using pentobarbital."). Even so, this Court affirmed the finding that "both sodium thiopental and pentobarbital are now unavailable to Oklahoma's Department of Corrections" where "the record show[ed] that Oklahoma ha[d] been unable to procure those drugs despite a good-faith effort to do so." *Id.* at 2738. Similarly, if the ADOC were no longer able to acquire midazolam and decided that no other drug was constitutionally suitable for use in lethal injection, while "lethal injection" would still be expressly authorized by statute, it would not be "available" to the ADOC as a method of execution. Nor is Price's "proposed alternative method . . . 'readily implemented'" simply because the words "nitrogen hypoxia" appear in the Code of Alabama. *Bucklew*, 139 S. Ct. at 1129 (quoting *Glossip*, 135 S. Ct. at 2737). Rather, because the State to this point "has been unable to procure" the means for executing someone with nitrogen gas "despite a good-faith effort to do so," nitrogen hypoxia remains unavailable. *Glossip*, 135 S. Ct. at 2738.

The Eleventh Circuit's error is thus the mirror image of the one this Court rejected just a few days ago in *Bucklew*. The *Bucklew* Court recognized that it would

be erroneous to conclude that a method of execution was not readily available to a state only because it was not statutorily authorized. *Bucklew*, 139 S. Ct. at 1128. Instead, a practical inquiry is required to see if the method, with a workable protocol, is readily available. Despite the *Bucklew* Court's focus on a practical inquiry into availability, the Eleventh Circuit took a formalistic approach, holding that whenever a state statute authorizes a method of execution, it is deemed available, even if has "never been used to carry out an execution and ha[s] no track record of successful use." *Id.* at 1130 (quotation marks omitted). Moreover, the *Price* decision gutted *Baze*, *Glossip*, and *Bucklew* by holding that when a state statute authorizes a method of execution through terms as vague as "nitrogen hypoxia"—and, presumably, terms like "lethal injection"—the State relieves an inmate of his burden to put forward a proposal that is "sufficiently detailed to permit a finding that the State could carry it out relatively easily and reasonably quickly." *Id.* at 1129 (quotation marks omitted). The Eleventh Circuit "agree[]d that Price," like Bucklew, "did not come forward with sufficient detail about how the State could implement nitrogen hypoxia to satisfy *Bucklew*'s requirement where the inmate proposes a new method of execution." *Price*, 2019 WL 1550234, at *8. But because "the State by law previously adopted nitrogen hypoxia as an official method of execution," the Eleventh Circuit held that "Price's burden" had been lifted. *Id.* Now, after *Price*, rather than satisfy *Bucklew*'s test, an inmate need merely "point[] to the executing

state's official adoption of that method of execution." *Id.* But Glossip's ability to point to past executions using pentobarbital did not shift his burden to Oklahoma. *A fortiori*, Price cannot shed his burden by pointing to a method of execution that *no* state has ever used.

The Eleventh Circuit reasoned that its new exception to *Bucklew* made sense because "it would be bizarre to put the onus on Price to come up with a proposed protocol for the State to use when the State has already adopted the particular method of execution and is required to develop a protocol for it, anyway." *Id.* But this is the same argument that Russell Bucklew made to this Court this term—an argument that was ***rejected*** in *Bucklew*. *See* Brief for Petitioner at 52, Bucklew v. Precythe, 139 S. Ct. 1112 (2019) (No. 17-8151) ("[T]here is no reason . . . to require an inmate to do more than prove that a State *has* other available options. *How* a State implements those other options—the detailed protocols and procedures it adopts—are ultimately up to the State."). This Court should correct the lower courts and undo the confusion they have sown by vacating the stay.

Make no mistake, the Eleventh Circuit's decision will have unintended negative consequences for states and inmates. A new penalty will attach to any state that statutorily authorizes a new method of execution as part of its "search for less painful modes of execution." *Id.* In light of this decision, Georgia and Florida would be foolish to even conditionally authorize new methods of execution, lest they

subject themselves to the new *Price* standard and exempt inmates from their burdens under *Baze*, *Glossip*, and *Bucklew*. And states outside the Eleventh Circuit may also think twice before trying to find more humane ways to carry out the ultimate punishment.

Yes, "nitrogen hypoxia" is listed alongside "lethal injection" in section 15-18-82.1 of the Code of Alabama. But the ADOC is still working to develop a safe, constitutional protocol and find sources for its necessary components. In the realm of capital punishment, this is seldom a simple task, as this Court is well aware. Therefore, this Court should vacate the stay of execution.

IV. Price failed to establish that he is entitled to a stay of execution.

It is well established that "a court may grant a stay of execution *only* if the moving party establishes that: '(1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; *and* (4) if issued, the injunction would not be adverse to the public interest.'" *Brooks v. Warden*, 810 F.3d 812, 818 (11th Cir. 2016) (citations omitted). The stay should be vacated because Price did not meet the requirements for a stay to issue.

First, even with his eleventh-hour evidence, Price still cannot demonstrate a substantial likelihood of success on the merits. While Price claims to present new evidence to sustain his burden, he still has not presented the district court (or

the Eleventh Circuit, or this Court) with any reliable evidence that "nitrogen would likely not result in substantial physical discomfort to Price." *Price*, 2019 WL 1550234, at *10. As the Eleventh Circuit noted, "the petitioner in *Bucklew*, admitted that feelings of suffocation could also occur with nitrogen gas. *Bucklew*, 2019 WL 1428884, at *13." *Id.* That court further noted that "the record in *Bucklew* supported the conclusion that the petitioner could be capable of feeling pain for 20 to 30 seconds when nitrogen is used for an execution. *Id*. The Eleventh Circuit also recognized expert testimony that suggested the effects of nitrogen could vary depending on how it was administered. *Id.*" *Id.* The affidavits presented by Price, at the last hour, do nothing to dispute those facts found by the Eleventh Circuit. Price, therefore, failed to meet his burden of naming a known and available alternative method of execution, and as for the other prong of his Eighth Amendment claim, "the very three-drug protocol approved by the Supreme Court in *Glossip* is the same one Alabama will use here." *Brooks*, 810 F.3d at 823.

The other factors also counsel against granting a stay. This Court has held that "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). For this reason, "equity must be sensitive to the State's strong interest in enforcing

its criminal judgments without undue interference from the federal courts." *Id.* As the Court noted in *Bucklew*:

> Mr. Bucklew committed his crimes more than two decades ago. He exhausted his appeal and separate state and federal habeas challenges more than a decade ago. Yet since then he has managed to secure delay through lawsuit after lawsuit. He filed his current challenge just days before his scheduled execution. That suit has now carried on for five years and yielded two appeals to the Eighth Circuit, two 11th-hour stays of execution, and plenary consideration in this Court. And despite all this, his suit in the end amounts to little more than an attack on settled precedent, lacking enough evidence even to survive summary judgment—and on not just one but many essential legal elements set forth in our case law and required by the Constitution's original meaning.

Bucklew, 2019 WL 1428884, at *14.

Here, the rights of the victims of Price's crime, the State, and the public interest at large heavily outweigh Price's last-minute request for a stay. Carrying out Price's lawful sentence pursuant to a state conviction "acquires an added moral dimension" because his postconviction proceedings have run their course. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). Price has been on death row for more than twenty-five years for a crime he committed in 1993. His crime was particularly heinous, as the trial court explained in sentencing him. C. 215; *see* Doc. 19 at 4 (quoting sentencing order). His conviction is valid, and a competent state court with jurisdiction over his case properly set his execution date according to Alabama law. Price initiated his first § 1983 litigation one month

after the State moved for his execution date in 2014 and the current § 1983 litigation two weeks after the State moved for a date in 2019. He has yet to demonstrate a substantial likelihood of success on the merits and his dilatory emergency motion for a preliminary injunction mere hours before his execution is nothing but a meritless delay tactic. This Court should strongly consider Alabama's interest in enforcing its criminal judgment and vacate the improvidently granted stay of execution.

CONCLUSION

The State respectfully requests that this Honorable Court vacate the stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April 2019, I did serve a copy of the foregoing on the attorney for Christopher Price by electronic mail, addressed as follows:

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